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76-3931

Supreme Court, U. S.

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MICHAEL J. ... CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No.

RICHARD J. O'CONNOR,
Petitioner-Appellant,
against

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,
Respondent-Appellee.

BRIEF OF APPELLEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS.

	Page
Statement	1
Statutes and Regulations Involved.....	2
Statement of Case	3
Questions Involved	6
Opinions Below	6
Reasons for Denying Certiorari	7
A. The respondent State Tax Commission was correct in determining that the services rendered by the appellant as a claims adjuster do not entitle him to a professional exemption within the intent and meaning of Tax Law, § 703(c)	7
B. The unincorporated business tax, as applied to the appellant is not arbitrary, discriminatory or unfair. It does not violate the appellant's rights under the due process or equal protection clauses of the State or Federal Constitutions.	12
Conclusion	15
Appendix A—Order and Decision of the Supreme Court	16
Appendix B—Order and Decision of the Appellate Division	22
Appendix C—Notice of Appeal	25
Appendix D—Order Dated February 19, 1976.....	27
Appendix E—Order Dated June 17, 1976	29

II.
TABLE OF CASES.

	Page
Adelsberg (Matter of) v. Bates, 278 App. Div. 606 . . .	10
Bowser (Matter of) v. Bates, 279 App. Div. 956	10
Koner v. Procaccino and Peterson v. Procaccino, 45 A D 2d 551	8,9
Lehmhausen v. Lake Shore Auto Parts Co., 410 U.S. 356	12
McMahan v. State Tax Commission, 45 A D 2d 624 . .	8
Rosenbloom (Matter of) v. State Tax Commission, 44 A D 2d 69	10
Schmidt (Matter of) v. Bates, 282 App. Div. 980	9
Shapiro v. City of New York, 32 N Y 2d 96, app. dismissed for want of subst. fed. question, 414 U.S. 804, reh. den., 414 U.S. 1087	12,13
Sheehan (Matter of) v. Murphy, 12 A D 2d 713	9
Traub v. Goodrich, 286 App. Div. 927	9

IN THE
Supreme Court of the United States

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No. 76-393

RICHARD J. O'CONNOR,
Petitioner-Appellant,

against

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,
Respondent-Appellee.

**BRIEF OF APPELLEE IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

Statement

Appellee submits this brief in opposition to appellant's petition for a writ of certiorari, on the ground that there is no substantial federal constitutional question involved and accordingly the appellants petition for a writ of certiorari should be denied.

Decisions of the New York Courts in this matter may be found at Misc 2d (unreported, NY Supreme Court,

Albany County Special Term, Part I decided January 15, 1975; affd. 50 AD 2d 675; appeal dismd. no sub. const. quest. 38 NY 2d 937; mot for rearg. den. 39 NY 2d 943.

Statutes and Regulations Involved

New York State Tax Law

"§ 703. Unincorporated business defined

* * *

"(c) Professions—The practice of law, medicine, dentistry or architecture and the practice of any other profession in which capital is not a material income producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual or the members of the partnership or other entity, shall not be deemed an unincorporated business."

20 New York Codes, Rules and Regulations (Department of Taxation and Finance), § 281.4

"281.4 Professions. The Statute, in declaring what shall constitute unincorporated business, excludes certain professions and is limited in its application to other professions.

* * *

"(c) What is a profession? In general, it may be said that a profession includes any occupation or vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interests or welfare in the practice of an art founded on it. The word implies attainment in professional knowledge, as distinguished

from mere skill, and the application of such knowledge to uses for others as a vocation.

"(d) The commission presently recognizes only the following as professions. It will weigh the representations made by or on behalf of other occupations or vocations when presented:

1. accounting;
2. certified shorthand reporting;
3. chiroprody;
4. dental hygiene;
5. engineering;
6. optometry;
7. osteopathy;
8. pharmacy;
9. physiotherapy;
10. teaching;
11. veterinary medicine and surgery;
12. psychology."

New York State Business Corporation Law, § 1501: cited at page 10 of this Brief.

New York State Education Law, Title Eight: cited at page 11 of this Brief.

Statement of Case

The appellant and his wife filed New York State income tax resident returns for the years 1967, 1968, 1969 and 1970 for income received by petitioner during those years for his activities as an independent claims adjuster. The appellant did not file New York State unincorporated business tax returns for those years.

Although the appellant had attended the University of Buffalo for two and a half years and had taken various night

courses and correspondence courses in insurance, he did not have a Bachelor's degree from any university.

From 1949 to 1962 the appellant was an insurance claims adjuster. Since 1962, he has been licensed by the New York State Insurance Department as an independent claims adjuster.

In his activities as an independent claims adjuster, the appellant, who works under the trade name of Chautauqua Claims Service, would be contacted by an insurance agency and would receive assignments from the insurance carriers. Upon receipt of the assignment, the appellant would talk to the insured, to various claimants and to witnesses. Based on his findings, the appellant would give the insurance carrier a factual appraisal of the situation and on opinion as to the carrier's liability.

The appellant's income was derived from personal services and capital was not a material income producing factor. He did not advertise, had no employees and had an office in his home for record keeping purposes.

On June 26, 1972, the New York State Department of Taxation and Finance issued a Statement of Audit Changes against the appellant, imposing unincorporated business tax upon the income tax received by him from his activities as a claims adjuster during the years 1967, 1968, 1969 and 1970. A Notice of Deficiency was issued in the amount of \$3,786.82.

Appellant requested a formal hearing by the New York State Tax Commission for a redetermination of the deficiency. A formal hearing was held on November 15, 1973, at which time evidence was introduced and testimony presented by the appellant to support his contention that he is a professional who is entitled to the professional exemption

from the unincorporated business tax in accordance with the provisions of section 703(c) of the Tax Law.

After reviewing the evidence and testimony presented at the formal hearing, the New York State Tax Commission decided that the appellant was not a professional who is entitled to the exemption from the unincorporated business tax.

Appellant then commenced a proceeding pursuant to Article 78 of the New York State Civil Practice Law and Rules to review the determination of the State Tax Commission.

Supreme Court, Albany County, (Special Term) held that the determination of the New York State Tax Commission was not arbitrary or capricious and confirmed the determination and dismissed the appellant's petition for review. A copy of the order and decision of the Supreme Court is attached as Appendix "A".

Appellant appealed to the New York Appellate Division, Third Department. The Appellate Division by an unanimous decision affirmed the judgment and order of Special Term. A copy of the order and decision of the Appellate Division is attached as Appendix "B".

The appellant then filed a notice of appeal to the New York Court of Appeals as of right pursuant to section 5601(b) of the New York Civil Practice Law and Rules. A copy of the notice of appeal is attached as Appendix "C".

By motion dated January 12, 1976, appellee moved to dismiss the appeal on the ground that there was no substantial constitutional question presented by the appeal. By order dated February 19, 1976, the New York Court of Appeals granted respondent's motion to dismiss upon the ground that no substantial constitutional question is directly involved. A copy of that order is attached as Appendix "D".

Appellant then moved in the Court of Appeals to reargue the motion to dismiss the appeal. The Court of Appeals by order dated June 17, 1976 denied the appellant's motion to reargue. A copy of that order is attached as Appendix "E".

Questions Involved

1. Was the appellant, who was an independent insurance adjuster, entitled to a professional exemption from the unincorporated business tax?
2. Is section 703 of the New York State Tax Law unconstitutional or in violation of the equal protection clauses of the New York State or Federal Constitutions?

The New York State Courts held that the appellant is not entitled to a professional exemption from the unincorporated business tax under section 703(c) of the New York Tax Law. The New York Courts also held that there was no merit in appellants assertion that there is a constitutional violation in the statutory exemption or its application.

Opinions Below

The New York Supreme Court, Special Term, held that the petitioner was not entitled to a professional exemption from the unincorporated business tax. The Appellate Division, Third Department, affirmed the judgment of the Supreme Court holding that the services rendered by the appellant as an independent claims adjuster do not entitle him to a professional exemption under subdivision (c) of section 703 of the New York Tax Law.

The Appellate Division, on the issue of the constitutionality of the application of the statute to the appellant held at 50 New York A D 2d 675 (3d Dept., 1975):

"We find no merit in petitioner's assertions that there is any constitutional violation in the statutory exemption or its application (see *Shapiro v. City of New York*, 32 N Y 2d 96; *People ex rel. Moffet v. Bates*, 276 App. Div. 38)."

The New York State Court of Appeals dismissed the appellants appeal for each of a substantial constitutional question and denied the appellants motion for a rehearing of the dismissal of the appeal.

REASONS FOR DENYING CERTIORARI

A.

The respondent State Tax Commission was correct in determining that the services rendered by the appellant as a claims adjuster do not entitle him to a professional exemption within the intent and meaning of Tax Law, § 703(c).

The basic issue is whether the appellant is exempt from the unincorporated business tax on the grounds that the income involved was derived from the practice of a profession.

"The term 'profession' implies knowledge of an advanced type in a field of science or learning gained by a prolonged course of specialized instruction and study. (*People ex rel. Tower v. State Tax Commission*, 282 N.Y. 407, 412; *Matter of Sundberg v. Bragalini* 7 A D 2d 15, 19, mot. for lv. to app. den. 6 N Y 2d 705; see 20 NYCRR 281.4).

"In determining what activity constitutes the practice of a profession consideration should be given to the following factors: (1) a long-term educational background generally associated with a degree in advanced field of science or learning; (2) the requirements of a license,

which indicates sufficient qualifications have been met prior to engaging in the occupation; (3) the control of the occupation; by standards of conduct, ethics and malpractice liability; and (4) the barrier to carrying on the occupation as a corporation. (*Matter of Rosenbloom v. State Tax Commission* 44 A D 2d 69, 70-71, and see Business Corporation Law § 1501 *et seq.*)” *McMahan v. State Tax Commission*, 45 A D 2d 624 (3d Dept., Sept. 1974).

The appellant does not have a college degree nor is one requisite for the claims adjuster. There is no evidence that there are any colleges and universities offering courses in claims adjusting or that the services rendered by a claims adjuster require knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction or study.

As the New York Appellate Division, Third Department, said in *Koner v. Procaccino* and *Peterson v. Procaccino*, 45 New York A D 2d 551:

“Primarily, we are concerned with the intent of the Legislature and, specifically, what was meant by the use of the words ‘the practice of any other profession.’ Several professions are enumerated in subdivision (c) of section 703, namely the practice of law, medicine, dentistry or architecture, and then follows the language, ‘and the practice of any other profession.’ These words must be read in conjunction with the professions listed under the rule of ejusdem generis (McKinney’s Cons. Laws of N.Y., Book 1, Statutes, § 239, subd. b). The words ‘any other’ which follow in line after an enumeration of things or classes are to be regarded as relating to similar things or classes, if the meaning intended is otherwise doubtful. (*Matter of Bowen v. Allen*, 17 A D 2d 12, 14, *affd.* 13 N Y 2d 663.) In our view, to be entitled to an exemption under this statute, in addition to the factors listed in *Rosenbloom*, the services performed must involve something

more than the type of services generally performed by those in the broader categories of a trade, business or occupation (cf. Tax Law § 703, subd. a). The services must also encompass some of the essential characteristics of the preceding enumerated professions. (See *Matter of Freeman*, 34 N Y 2d 1, 7.)”

Although the appellant has taken courses in insurance and business law which the appellant has specifically stated were not required by the insurance companies, and by virtue of his study and experience is able to assist insurance companies in settling a case, the mere fact that he is an expert in adjusting claims does not mean that he is practicing a profession. (*Matter of Sheehan v. Murphy*, 12 New York A D 2d 713 [3d Dept., 1960].)

As the New York Appellate Division, Third Department, said in *Traub v. Goodrich*, 286 New York App. Div. 927:

“Concededly, petitioner’s activities require specialized skill and technical knowledge but his status does not require ‘knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study’ which is essential to the term ‘professional’ as used in the statute. (*People ex rel. Tower v. State Tax Commission*, 282 N.Y. 407, 412.)”

The appellant is engaged in the business of supplying facts and information along with his personal opinions to insurance carriers in order to assist them in settling a case. This appellant sells his services to a nonprofessional insurance company. His activities constitute the carrying on of a business rather than the practice of a profession. *Koner v. Procaccino* (*supra*). The appellant has not established that he comes within section 703(c) of the New York Tax Law and has expressed in *Matter of Schmidt v. Bates* (282 New York App. Div. 980), a professional exemption should not be extended to new categories.

As a claims adjuster, the appellant is a valuation expert. Three cases in which it was decided by the New York Courts that valuation experts are not entitled to a professional exemption are: *Matter of Bowser v. Bates*, 279 New York App. Div. 956 (3d Dept., 1952); *Matter of Adelsberg v. Bates*, 278 New York App. Div. 606 (3d Dept., 1951); and *Matter of Rosenbloom v. State Tax Commission*, 44 New York A D 2d 69 (3d Dept., 1974). In *Matter of Bowser v. Bates*, *supra*, the New York Appellate Division, Third Department, held that the petitioner there, who was an insurance adjuster who established marine losses, was not practicing a profession and was not entitled to an exemption from the unincorporated business tax. In the *Bowser* case, the Court said at 279 New York App. Div. 956:

"Petitioner's occupation may be somewhat unique but the commission could well find it did not rise to the dignity of a profession within the authorities on the subject
• • •"

In both *Adelsberg* and *Rosenbloom*, the petitioners were real estate appraisers (valuation experts in land) and in both cases, the New York Appellate Division held that the petitioners were not practicing a profession.

Appellant goes to great length in his contention that since professionals may incorporate under the New York State Business Corporation Law, professionals are no longer in need of an exemption from the unincorporated business tax. Appellant contends that he is a professional and that thus should be exempt from the unincorporated business tax.

It is submitted that the appellant would not even qualify as a professional under the provisions of Article 15 of The New York State Business Corporation Law.

Section 1501 of the New York State Business Corporation Law reads in part:

"§ 1501. Definitions

• • •

"(b) 'Profession' includes any practice as an attorney and counselor-at-law, or as a licensed physician, and those occupations designated in title eight of the education law."

Title eight of the New York State Education Law does not list a licensed adjuster as a profession. The only professions listed under Title eight of the New York State Education Law are as follows:

Medicine
Physical Therapy
Physician's associates and specialist's assistants
Chiropractic
Practice of Massage
Dentistry and dental hygiene
Veterinary medicine
Pharmacy
Nursing
Podiatry
Optometry
Ophthalmic dispensing
Engineering and land surveying
Architecture
Landscape architecture
Public accountancy
Shorthand reporting
Psychology
Social Work
Massage
Speech Pathologists and Audiologists.

It is submitted that the appellant did not establish that he is a professional who is entitled to the exemption from the unincorporated business tax.

B.

The unincorporated business tax, as applied to the appellant is not arbitrary, discriminatory or unfair. It does not violate the appellant's rights under the due process or equal protection clauses of the State or Federal Constitutions.

The appellant contends that in his activities as a claims adjuster, he renders objective opinions to his clients in the same manner as attorneys. He contends that his work is so similar to an attorney's work that if he is denied the same exemption from the unincorporated business tax as attorneys, he is being denied equal protection of the law.

It is submitted that the appellant's activities are not the same as an attorney's. He does not have a law degree, nor is he licensed to practice as an attorney. He does not and may not draw contracts; he does not and may not argue or try cases in the courts. He does not and may not prepare release forms. He only fills in the blanks on forms that have been prepared by attorneys.

It is submitted that there is no merit in appellant's contention that to exclude him from exemption granted to lawyers violates the equal protection clause of the Fourteenth Amendment of the United States Constitution or Article 1, Section 6 of the New York State Constitution. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356; *Shapiro v. City of New York*, 32 N Y 2d 96 (1973), appeal dismissed for want of a substantial federal question, 414 U.S. 804, reh'g. den. 414 U.S. 1087.

As was stated by the New York Court of Appeals in *Shapiro v. City of New York*, *supra*, a case which dealt with the unincorporated business tax exemption as applied to professionals:

"Due Process Claim"

"There can be no doubt that the tax law with which we are concerned was enacted solely and simply as an exercise of the taxing power; it was not motivated by any purpose other than the raising of revenue. 'This being so, the due process clause may not here be availed of to condemn the statute. That clause, it has been said, "is applicable to a taxing statute * * * only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.'" (*Magnano Co. v. Hamilton*, 292 U.S. 40, 44.)' (*Ampco Print.-Advs. Corp. v. City of New York*, 14 N Y 2d 11, 24, app. dsmd. for want of a substantial Federal question, 379 U.S. 5; see *Lehnhausen v. Lake Shore Auto Parts Co.*, U.S., 41 U. S. Law Week 4289, 4290 [decided Feb. 22, 1973].)"

As to the appellant's contention that he is being denied equal protection under the laws, *Shapiro (supra)*, went on to say:

"Equal Protection Claims"

"So far as the plaintiffs equal protection claims are concerned, the governing principles are familiar and well settled. The rule is elementary that 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.' *Madden v. Kentucky*, 309 U.S. 83, 88; see, also, e.g., *Lehnhausen v. Lake Shore Auto Parts Co.*, U.S., U.S. Law Week 4289, 4290-4292 [decided Feb. 22, 1973], *supra*; *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-528; *Walters v. City of St. Louis*, 347 U.S. 231, 237-238; *Wisconsin v. J. C. Penny Co.*, 311 U.S. 435, 445; *Lawrence v. State Tax Comm.*, 286 U.S. 276, 283; *Matter of Roosevelt Raceway v. County of Nassau*, 18 N Y 2d 30, 39, app. dsmd. for want of a substantial Federal question, 385 U.S. 453; *Ampco Print.-*

Adv. Corp. v. City of New York, 14 N Y 2d 11, 24, *supra*.) As the Supreme Court observed, just about four weeks ago, in the *Lehnhausen* case (.... U.S., 41 U.S. Law Week 4289, 4290, *supra*), 'Where taxation is concerned and no specific federal right, apart from equal protection, is imperilled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. As stated in *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-527: "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of exercise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." ' "

It is submitted that the appellant does not qualify as a professional and his rights under the due process clause and the equal protection clause of the State and Federal Constitutions are not being violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York,
October 6, 1976.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

RUTH KESSLER TOCH
Solicitor General of the
State of New York

THOMAS P. ZOLEZZI
Assistant Attorney General of
the State of New York

of Counsel

APPENDIX A.**Order and Decision of the Supreme Court.**

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the Courthouse in the City of Albany, New York, on the 13th day of December, 1974.

Present: HONORABLE JOHN T. CASEY,
Justice Presiding.

—○—
In the Matter of the Application
of

RICHARD J. O'CONNOR,

Petitioner,

against

THE STATE TAX COMMISSION OF THE STATE
OF NEW YORK,

Respondent,

To review a determination made after a hearing in the matter of Unincorporated Business Taxes Under Article 23 of the Tax Law for the years 1967, 1968, 1969 and 1970.

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Index No.
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The petitioner commenced a proceeding pursuant to Article 78 of the Civil Practice Law and Rules to review a determination of the State Tax Commission which sustained unincorporated business tax assessments imposed under Article 23 of the Tax Law.

Appendix A—Order and Decision of the Supreme Court.

Now, after reading and filing the notice of petition dated the 30th day of October, 1974, the petition of Johnson, Peterson, Tener and Anderson (H. James Abdella, of counsel), counsel for the petitioner, in support of the proceeding, dated the 30th day of October 1974, and upon reading and filing the answer and return of the respondent sworn to on the 26th day of November 1974, by Saul Heckelman, counsel to the State Tax Commission, and after hearing Johnson, Peterson, Tener and Anderson (H. James Abdella, Esq.), of counsel in support of the petition, and Louis J. Lefkowitz, Attorney General of the State of New York (Thomas P. Zolezzi, Assistant Attorney General), of counsel for the respondent in opposition to petitioner's petition, and due deliberation having been had, and the Court having rendered a decision in writing dated the 15th day of January, 1975, a copy of which is attached to and made a part of this order;

Now, on the motion of Louis J. Lefkowitz, Attorney General of the State of New York, it is

ORDERED that the determination be and is hereby confirmed and it is further

ORDERED that the petition be and is hereby dismissed without costs.

Dated: January 22, 1975,
Troy, New York.

ENTER

(Seal)

/s/ JOHN T. CASEY,
Justice of the Supreme Court.

Appendix A—Order and Decision of the Supreme Court.

State of New York,
County of Albany Clerk's Office } ss.:
No. 3898

I, JAMES J. COYNE, JR., Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy order with the original thereof filed in this office on the 28 day of Jan. 1975 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this 28 day of Jan. 1975.

(Seal) JAMES J. COYNE, JR.,
Clerk.

Appendix A—Order and Decision of the Supreme Court.

Memorandum.

STATE OF NEW YORK

SUPREME COURT—County of Albany

—o—

In the Matter of the Application
of

RICHARD J. O'CONNOR,

Petitioner,

against

THE STATE TAX COMMISSION OF THE STATE
OF NEW YORK,

Respondent.

To review a determination made after a hearing in the matter of Unincorporated Business Taxes Under Article 23 of the Tax Law for the years 1967, 1968, 1969 and 1970.

—o—

(Supreme Court, Special Term, Albany County,
December 13, 1974)
(Justice John T. Casey, Presiding)

Appearances:

Johnson, Peterson, Tener & Anderson, Esqs., H. James Abdella, Esq., Of Counsel, Attorneys for Petitioner, Bankers Trust Building, Jamestown, New York 14701.

Hon. Louis J. Lefkowitz, Attorney General, Attorney for Respondent, Thomas P. Zolezzi, Esq., Of Counsel, The Capitol, Albany, New York 12224.

Appendix A—Order and Decision of the Supreme Court.

CASEY, J.

This is a proceeding pursuant to Article 78 of the CPLR to review a determination of the State Tax Commission, which sustained unincorporated business tax assessments imposed under Article 23 of the Tax Law.

The petitioner was assessed unincorporated business tax liability upon income derived from his activities as an independent claims adjuster. The facts as developed in a formal hearing before a hearing officer designated by the State Tax Commission are undisputed.

The petitioner is a high school graduate and attended the University of Buffalo for two and one-half years. Subsequently, he took all the insurance night courses at the Millard Fillmore College at the University of Buffalo and various correspondence courses through New Amsterdam Casualty Company. From 1949 to 1962 he was an adjuster. In 1962, the petitioner obtained an independent adjuster's license from the New York State Department of Insurance. As an independent adjuster he would be contacted by an insurance agency and given an assignment. Upon receipt of the assignment, he would contact the insured and obtain a statement from him; petitioner would also contact various witnesses. Upon completion of those procedures, the petitioner would issue a written report to the insurance carrier stating his opinion as to the liability of the carrier.

The issue presented is one of law. *Koner v. Procaccino*, 45 App. Div.2d 551. There are several factors to be considered in determining whether the activities of the petitioner constitute a profession within the meaning of Subdivision (c) of Section 703 of the Tax Law. In *Rosenbloom v. State Tax Com-*

Appendix A—Order and Decision of the Supreme Court.

mission, the Appellate Division listed four such factors: (1) a long-term educational background generally associated with a degree in an advanced field of science or learning; (2) the requirement of a license which indicated sufficient qualifications have been met prior to engaging in the occupation; (3) the control of the occupation by standards of conduct, ethics and malpractice liability; and (4) the barrier to carrying on the occupation as a corporation. 44 App. Div.2d 69. With regard to the fourth consideration, the court noted that it was less significant since New York now permits professionals to incorporate. *Id.* at 71 n. In *Koner v. Procaccino*, the Appellate Division added an additional consideration, i.e., the services performed must involve something more than the type of services generally performed by those in the broader categories of trade, business or occupation.

Based upon previous decisions of the Appellate Division wherein the occupations of marine insurance adjuster and real estate appraisers were denied the status of a profession within the meaning of Subdivision (c) of Section 703 of the Tax Law, the respondent State Tax Commission was not arbitrary or capricious in denying petitioner's application. Compare *Bower v. Bates*, 279 App. Div. 956 with *Adelberg v. Bates*, 278 App. Div. 606 and with *Rosenbloom v. State Tax Commission*, *supra*.

Petition dismissed. Submit judgment.

Dated: Troy, New York,
January 15, 1975.

APPENDIX B.

Order and Decision of the
Appellate Division.

At a Term of the Appellate Division of the Supreme Court in
and for the Third Judicial Department held at the Em-
pire State Plaza Justice Building in the City of Albany,
New York, commencing on the 20th day of October,
1975.

Present:

Hon. Louis M. Greenblott, *Justice Presiding*,
Hon. Michael E. Sweeney,
Hon. Harold E. Koreman,
Hon. Robert G. Main,
Hon. Walter B. Reynolds, *Associate Justices*.

—o—
In the Matter of the Application
of
RICHARD J. O'CONNOR,

Appellant,

against

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

To review a determination made after a hearing in the Matter
of Unincorporated Business Taxes Under Article 23 of the
Tax Law for the years 1967, 1968, 1969 and 1970.

—
No. 26082
—o—

Appendix B—Order and Decision of the Appellate Division.

The appellant having appealed from a judgment of the
Supreme Court at Special Term, entered in the office of the
Clerk of Albany County on January 28, 1975 which dismissed
petitioner's application, in a proceeding pursuant to CPLR
Article 78, and confirmed a determination of the State Tax
Commission sustaining unincorporated business tax
assessments imposed under Article 23 of the Tax Law; and
said appeal having been presented during the above-stated
Term of this Court and having been argued by Johnson,
Peterson, Tener and Anderson (H. James Abdella, Esq.), of
counsel for the appellant, and Thomas P. Zolezzi, Esq.,
Assistant Attorney General, of counsel for respondent, and,
after due deliberation, the Court having rendered a decision
on the 20th day of November, 1975, it is hereby

ORDERED, that the judgment be and the same is hereby
affirmed, without costs.

ENTER:

/s/ JOHN J. O'BRIEN,
Clerk.

Dated and Entered: November 24, 1975.

A true copy:

(Seal) JOHN J. O'BRIEN,
Clerk.
—

*Appendix B—Order and Decision of the Appellate Division.*SUPREME COURT—Appellate Division
Third Judicial Department

November 20, 1975

— o —

In the Matter
of
RICHARD J. O'CONNOR,
Appellant,

v.

STATE TAX COMMISSION,
Respondent.

—

26082

— o —

Appeal from a judgment of the Supreme Court at Special Term, entered January 28, 1975 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, and confirmed a determination of the State Tax Commission sustaining unincorporated business tax assessments imposed under article 23 of the Tax Law.

We agree with the court's decision confirming the determination of the respondent that the services rendered by petitioner as an independent claims adjuster do not entitle him to a professional exemption under subdivision (c) of section 703 of the Tax Law (*People ex rel. Tower v. State Tax Commission*, 282 N.Y. 407; *Matter of Koner v. Procaccino*, 45

Appendix C—Notice of Appeal.

A D 2d 551; *Matter of Rosenbloom v. State Tax Comm.*, 44 A D 2d 69). On this record, such a finding is not arbitrary or capricious. We find no merit in petitioner's assertions that there is any constitutional violation in the statutory exemption or its application (see *Shapiro v. City of New York*, 32 N Y 2d 96; *People ex rel. Moffet v. Bates*, 276 App. Div. 38).

Judgment affirmed, without costs.

Greenblott, J. P., Sweeney, Koreman, Main and Reynolds, JJ., concur.

APPENDIX C.**Notice of Appeal.**STATE OF NEW YORK
Appellate Division—Third Department

— o —

In the Matter of the Application
of
RICHARD J. O'CONNOR,

Appellant,

v.

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

—

Index No. 26082

— o —

PLEASE TAKE NOTICE, that the above-named Appellant hereby appeals to the Court of Appeals from the Order of the

Appendix C—Notice of Appeal.

Appellate Division, Third Department, duly entered on November 24, 1975, which Order affirms the judgment of the Supreme Court at Special Term entered January 28, 1975 in Albany County, which dismissed Petitioner-Appellant's application pursuant to CPLR Article 73 for annulment of Respondent's deficiency assessment for unincorporated business taxes for the years 1967, 1968, 1969 and 1970.

Dated: December 19, 1975.

JOHNSON, PETERSON, TENER
& ANDERSON,
(H. James Abdella, Esq.,
of counsel),
Attorneys for Appellant-Petitioner,
Bankers Trust Building,
Jamestown, New York 14701,
Phone (716) 664-5210.

To:

Mr. Thomas P. Zolezzi,
Attorney for Respondent,
Assistant Attorney General,
New York State Department of Law,
Albany, New York 12224.

APPENDIX D.

Order Dated February 19, 1976.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of February A. D. 1976.

Present: Hon. Charles D. Breitell,
Chief Judge, presiding.

—o—
In the Matter of the Application
of
RICHARD J. O'CONNOR,

Appellant.

vs.

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

—
Mo. No. 64
—o—

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix D—Order Dated February 19, 1976.

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

(Seal) JOSEPH W. BELLACOSA,
Joseph W. Bellacosa,
Clerk of the Court.

APPENDIX E.**Order Dated June 17, 1976.**

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of June A. D. 1976.

Present: Hon. Charles D. Breitell,
Chief Judge, presiding.

—————o—————
In the Matter of the Application
of
RICHARD J. O'CONNOR,

Appellant,

vs.

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

—————
Mo. No. 612
—————o—————

A motion for reargument of a motion to dismiss the appeal in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

(Seal) JOSEPH W. BELLACOSA,
Joseph W. Bellacosa,
Clerk of the Court.